

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH H. BENNETT, SR.,

Defendant-Appellant.

UNPUBLISHED

May 1, 2003

No. 231256

Wayne Circuit Court

LC No. 93-013461

Before: Bandstra, P.J., and Zahra and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his resentencing that occurred after a remand from this Court. See *People v Bennett*, 241 Mich App 511, 518; 616 NW2d 703 (2000). We affirm.

A jury convicted defendant of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim under thirteen years of age), and one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim under thirteen years of age). The trial court originally sentenced him to life imprisonment for the CSC I convictions and ten to fifteen years' imprisonment for the CSC II conviction. On appeal, this Court affirmed defendant's convictions but remanded the case for resentencing, holding that a life sentence violated the principle of proportionality. *Bennett, supra* at 517-518. On remand, the successor sentencing court conducted a hearing, rescored the sentencing guidelines, and sentenced defendant to twenty to forty years' imprisonment for the CSC I convictions.¹

Defendant first argues that the sentences of twenty to forty years' imprisonment imposed at the resentencing were disproportionate because of his advanced age, his ill health, his lack of a prior record, and the absence of any physical injury to the victim. This Court reviews a trial court's sentencing decisions for an abuse of discretion. *People v Williams*, 223 Mich App 409, 410; 566 NW2d 649 (1997). A sentence is an abuse of the trial court's discretion if "it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender."² *Id.* at 411.

¹ Defendant was not resentenced for the CSC II conviction, and he does not currently challenge his sentence for that conviction.

² Because of the date of the offenses, the judicial sentencing guidelines and the standard from (continued...)

Defendant's twenty-year minimum sentence was within the range recommended by the judicial sentencing guidelines, as rescored by the successor sentencing court after an evidentiary hearing. A sentence within the minimum sentence range recommended by the judicial sentencing guidelines is presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Hogan*, 225 Mich App 431, 437; 571 NW2d 737 (1997). To overcome this presumption, a defendant must show that there are unusual circumstances in his case that render a sentence within the guidelines disproportionate. See *Hogan*, *supra* at 437.

A defendant's age and lack of criminal history are not unusual circumstances sufficient to overcome the presumption of proportionality. See *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994), and *People v Piotrowski*, 211 Mich App 527, 532-533; 536 NW2d 293 (1995). Moreover, one's health is a matter that may fluctuate weekly, or even daily, and has little if any relevance to the legal predicament in which a convicted felon finds himself. Recognizing that factor as an unusual circumstance would not serve to fashion trustworthy sentences. Additionally, even though the child victim was apparently not physically injured, she did suffer ongoing psychological injury. Defendant has simply failed to demonstrate that this case exhibits unusual circumstances; the sentences imposed for the CSC I convictions were proportionate.

Defendant next argues that the law of the case doctrine precluded the successor sentencing court from reconsidering and rescored the guidelines at the resentencing. Defendant asserts that this Court, in the first appeal, did not consider the propriety of the original guidelines' calculations in the appeal from defendant's life sentence but instead merely held that the life sentences violated the principle of proportionality. Defendant therefore concludes that the trial court exceeded the parameters of this Court's remand and violated the doctrine of the law of the case by revisiting its predecessor's guidelines' scoring decisions.

The law of the case doctrine generally precludes a trial court on remand from revisiting legal questions and deciding them differently than the appellate court. *People v Fisher*, 449 Mich 441, 444-445; 537 NW2d 577 (1995). However, the trial court remains free on remand to decide, or reconsider, issues that have not been decided by the appellate court. As our Supreme Court observed in *Fisher*, *supra* at 446-447, quoting *Sokel v Nickoli*, 356 Mich 460, 464; 97 NW2d 1 (1959), "The power of the lower court on remand is to take such action as law and justice may require so long as it is not inconsistent with the judgment of the appellate court." The *Fisher* Court further stated that "the doctrine of the law of the case has no application where a case is remanded without directions to the lower court; in such a case the lower court would enjoy the same power as if it made the ruling itself." *Fisher*, *supra* at 447.

The law of the case doctrine has no application to the present appeal. As defendant admits, in the previous appeal this Court *did not consider* the issue of the trial court's scoring of the guidelines. This Court decided only that a life sentence violated the principle of proportionality. *Bennett*, *supra* at 517. Therefore, the finding of disproportionality was the only issue decided in the previous appeal that could bind the trial court on remand.

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Williams applied to this case.

Because no issue regarding the scoring of the sentencing guidelines was decided by the appellate court in the previous appeal, the trial court was free to reconsider the scoring of the guidelines when the case was remanded for a *new* sentencing. A resentencing is a *new* sentencing, with all its attendant requirements.³ At resentencing, defendant was entitled to have an updated presentence report (including circumstances intervening since the original sentencing) prepared, see *People v Triplett*, 407 Mich 510, 515; 287 NW2d 165 (1980), and to address the court before sentence was imposed, see MCR 6.425(D)(2)(c), even though he had a presentence report prepared and had already addressed the court at the previous sentencing. The court rules also provide that, before sentencing, the sentencing guidelines must be calculated. MCR 6.425(D)(1). There is no legitimate distinction that would permit the sentencing court to revisit and update the presentence report but at the same time forbid the court from recalculating the sentencing guidelines – particularly where, as here, an evidentiary hearing was held and testimony was taken in support of the rescoring.

Defendant essentially asks this Court to ignore the fact that no issue regarding the scoring of the sentencing guidelines was decided in the prior appeal. In fact, this Court likely could not have decided such an issue under *People v Mitchell*, 454 Mich 145, 176-178; 560 NW2d 600 (1997) (the scoring of the judicial sentencing guidelines does not present a cognizable claim for appellate review). This Court's order that the trial court must resentence defendant was not, contrary to defendant's view, an implicit directive that the resentencing had to be conducted under the previously-scored sentencing guidelines because that issue was never presented to, or decided by, this Court.

The sentencing court was within its discretion to conduct a hearing and to rescore the sentencing guidelines in accordance with the information gleaned from that hearing. By upholding the sentencing court's reasonable exercise of discretion in this regard, this Court effectuates the overriding mandate that sentences are to be tailored to the individualized circumstances of the offender. See *People v McFarlin*, 389 Mich 557, 574; 208 NW2d 504 (1973). Defendant has not demonstrated an abuse of the sentencing court's discretion.

Defendant next argues that once the original trial judge calculated the sentencing guidelines, the calculation was final and could not be changed when the case was remanded for resentencing.⁴ The argument seems largely a rehash of defendant's "law of the case" argument discussed above. To the extent it differs, defendant cites no authority for his position. Moreover, the record does not demonstrate that defendant preserved this claim by arguing below that the successor sentencing court was without authority to recalculate the sentencing guidelines at the resentencing.⁵ We therefore decline to consider defendant's unsupported and unpreserved

³ Defendant admits, in his brief on appeal, that "[r]e-sentencing procedures are governed by the same principles and requirements as those applicable to original sentencing procedures."

⁴ Defendant also argues that the court erred by sentencing him to twenty to forty years' imprisonment when the guidelines' recommended range was 36 to 96 months. However, this range was produced at the original sentencing; the newly-calculated and applicable range was 120 to 300 months.

⁵ Defendant never objected to the trial court's authority to conduct a hearing and rescore the sentencing guidelines. Additionally, at the resentencing hearing, defendant informed the

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argument. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998), and *People v Mayfield*, 221 Mich App 656, 660-661; 562 NW2d 272 (1997).

Defendant next argues that the sentencing court erred by failing to review the trial transcripts before imposing sentence. However, defendant did not request that the trial court review the trial transcript before the resentencing and did not object that the trial court had not reviewed the trial transcript. This issue is therefore forfeited. *People v Mayhew*, 236 Mich App 112, 121; 600 NW2d 370 (1999).

In any event, the trial court was provided with an updated presentence report, several witnesses – including defendant and the complainant – testified at the evidentiary hearing, and the complainant’s testimony included a recitation of the allegations she had made at trial. Defendant has failed to demonstrate that a reading of the trial transcripts would have provided more relevant information or resulted in a more appropriate sentence.

Defendant next argues that his right against being twice placed in jeopardy, US Const, Am V and Am XIV; Const 1963, art 1, § 15, was violated by the prosecutor’s presentation of evidence of other uncharged criminal sexual conduct offenses. However, defendant did not object below on double jeopardy grounds, and this issue is therefore unpreserved. We review unpreserved issues using the plain error standard of review. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). We find no plain error. Indeed, as noted above, the successor sentencing court was entitled to revisit the factors to be taken into consideration in sentencing defendant, and a sentencing court may consider criminal conduct not resulting in a conviction. See, e.g., *People v Raby*, 218 Mich App 78, 81-84; 554 NW2d 25 (1996), and *People v Purcell*, 174 Mich App 126, 130-131; 435 NW2d 782 (1989). Resentencing is unwarranted.

Defendant next argues that the trial court committed error requiring reversal when it failed to sequester the prosecutor’s witnesses at the sentencing hearing. Defendant did not request that the witnesses be sequestered and did not object when they were permitted to remain in the courtroom. In fact, defense counsel affirmatively stated that the witnesses should not be sequestered. Therefore, this issue was waived, and there is no error to review. *People v Carter*, 462 Mich 206, 215, 219; 612 NW2d 144 (2000).

Defendant next argues that the prosecutor made improper comments to the trial court concerning defendant’s decision to exercise his right to a jury trial and his right to remain silent at his trial. Defendant did not object to the prosecutor’s comments that he now claims were improper. “Appellate review of improper prosecutorial remarks is generally precluded absent objection by counsel because the trial court is otherwise deprived of an opportunity to cure the error.” *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). “An exception exists if

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sentencing judge that the predecessor judge had granted a motion at the original sentencing to score offense variable 12 at twenty-five points and further indicated that – even though the original sentencing information report failed to reflect this recalculation – the guidelines should actually be 96 to 180 months. This last point reinforces that defendant recognized that the successor sentencing court had at least some authority to correct the scoring of the guidelines.

a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice.” *Id.* Responsive comments are generally not a basis for finding error. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977).

After considering these remarks in context, *People v Bahoda*, 448 Mich App 261, 267; 531 NW2d 659 (1995), we conclude that the prosecutor’s comments do not warrant resentencing. The prosecutor’s comments were made to the sentencing court and not to a jury,⁶ they were responsive to comments made by defense counsel in which counsel attempted to portray defendant in a sympathetic light, defendant did not object to the comments, and he has failed to demonstrate any prejudice. Defendant has failed to demonstrate plain error that affected his substantial rights. See *Carines*, *supra* at 763-764.

Defendant finally argues that he was deprived of the effective assistance of counsel when his attorney decided to have defendant testify at the sentencing hearing. Defendant asserts that his testimony that he considered himself the real victim and that the complainant was the aggressor caused the sentencing court to disfavor him. We find no merit to this claim.

Defendant failed to move for a new trial or an evidentiary hearing; therefore, this Court’s review is limited to the existing record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). If the record does not support defendant’s claim, he has waived the issue. *Id.* at 659. Defendant must establish that his counsel’s performance was below an objective standard of reasonableness under prevailing professional norms and that a reasonable probability exists that, but for counsel’s error, the result of the proceeding would have been different. *Id.*

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000). The decision to present particular witnesses is a matter of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). This Court does not second-guess counsel on matters of trial strategy. See *id.* at 76-77. We conclude that defense counsel’s decision to present defendant’s testimony did not fall below reasonable professional norms. Defendant was the only person who could effectively counter the testimony offered by the prosecutor’s witnesses. Although there was always the risk that defendant’s testimony might be unconvincing, or that he might further implicate himself, or that, as defendant now asserts, he would substantiate the unfavorable impression the prosecutor’s witnesses had created, those risks were part and parcel of the strategic decision that is entrusted to trial counsel’s professional judgment.⁷

⁶ “Unlike a jury, a judge is presumed to possess an understanding of the law, which allows him to understand the difference between admissible and inadmissible evidence or statements of counsel.” *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992).

⁷ Moreover, we cannot conclude that the result of the resentencing would have been different had defendant not testified at the hearing. See *Sabin*, *supra* at 659.

Affirmed.

/s/ Richard A. Bandstra

/s/ Brian K. Zahra

/s/ Patrick M. Meter